Teamsters Local 413, affiliated with International Brotherhood of Teamsters, AFL–CIO (Refiners Transport & Terminal Corporation) *and* Jonah Dean Rogers. Cases 9–CB–8558 and 9–CB–8695

February 16, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On July 13, 1994, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings as modified,[2] and conclusions only to the extent consistent with this Decision and Order.

On March 28, 1993,[3] the Respondent's executive board suspended Jonah Dean Rogers from his position as steward at Refiners Transport (the Employer). The judge found that the Respondent removed Rogers because he had engaged in statutorily protected activities in February and March and therefore the Respondent's removal of Rogers violated Section 8(b)(1)(A) of the Act. We agree.

The judge further found that the Respondent violated Section 8(b)(1)(A) by removing Rogers a second time as steward in September. We find merit to the Respondent's exception to this finding.

The record shows that on July 20 at the Employer's facility, Rogers physically assaulted employee Art Osborne, who had been appointed acting steward while Rogers' March removal as steward was being appealed.

On July 26, joint council 41, an appeals panel designated by the general president of the International Brotherhood of Teamsters, convened in an attempt to settle the appeals by Rogers and the other stewards regarding their removals in March. Secretary-treasurer, Charles Teas, stated that he would have no problem with reinstating all the stewards except Rogers and Phil Mormile. When asked why, Teas said because Rogers ''has pending Labor Board charges.'' Teas finally agreed to reinstate Rogers because ''most of the guys on that panel were sort of irritated that I wanted to exclude one.''

On August 2, Respondent's president, Vernon Bell, reinstated the stewards retroactive to March and waived their dues for that time period.[4]

Employee Larry Mattes was upset about Rogers' attack on Osborne and dissatisfied with Rogers' stewardship. In August, Mattes told Rogers that he intended to petition for a new election for steward. Rogers said that a petition would not be necessary. Rogers' consent to an election was relayed to Business Agent Jeffrey Pierce.

A frequently used procedure for holding elections for stewards at the Employer's facility was to post a notice of election at the terminal for 7 days. Anyone interested could sign their name as a candidate on the notice. At the end of that time, the business agent would remove the notice and post another notice of who the candidates were and place a sealed ballot box where employees would cast their ballots. After 7 days, the business agent and members of the Union would open and count the ballots.

On August 27, Pierce posted a notice of the election containing a signup sheet for candidates at the Employer's facility. The notice stated that it would be posted Friday, August 27, and removed Friday, September 3, and that the election would be held at a later date. An unknown individual took down the notice 1 or 2 days before September 3.

Pierce stated that because of the sabotaging of the nominating process by the removal of the notice, he decided to hold a mail ballot election. On September 7, Pierce notified all eligible voters that because of the unauthorized removal of the signup sheet, the Respondent was conducting a secret-mail ballot election for the steward and alternate steward positions, with the counting of ballots scheduled for 4 p.m. on September 17. Pierce enclosed a ballot with blanks for the voter to fill in the name of the person desired for each position.

Rogers secured permission from the Employer to be released from work in time to witness the count. On September 13, Pierce changed the time of the count to 2 p.m. Because Rogers was unable to attend, he arranged for former employee Jim Kirk to witness the counting on his behalf.

[1] The Respondent's request for oral argument is denied because the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates hereinafter refer to 1993.

[4] The Respondent contends that the Board should defer to the July settlement between Rogers and the joint council of the International Brotherhood of Teamsters reinstating Rogers to his position as steward. We find no merit to this contention. The record contains no specifics regarding the provisions of the settlement and shows that instead of supporting the settlement, the Respondent remained opposed to Roger's reinstatement at least in part because he had filed the instant unfair labor practice charge.

When Kirk appeared for the count, Pierce said that he could not observe because he was neither a member of Respondent in good standing nor a current employee of the Employer. Kirk acknowledged that he had not been actively employed by the Employer for 2 years and was on involuntary withdrawal status from the Union.

Pierce, George Saunders (another business agent), and employees William Baldwin, Howard Janes, and David Lester were present at the counting of the ballots. Out of approximately 39 eligible voters, Mattes received 26 votes, Rogers received 6 votes, and 2 other individuals received 1 vote each.

Based on findings that the mail ballot election was unfair, coupled with the animus that motivated the earlier removal as steward, the judge concluded that the removal of Rogers as steward in September was a second violation of Section 8(b)(1)(A). We disagree.

Critical to the judge's conclusion is the finding that the manner in which the Respondent conducted the mail ballot election was unfair. To make this finding, the judge focused on the change to a mail ballot election and the change in the time of the ballot count.

According to the judge, the change to a mail ballot election was unfair because it precluded a nomination procedure. The record does not support this finding. The Respondent attempted to conduct the election as in the past by posting a notice of election and nomination form. Because the procedure was sabotaged, the Respondent decided to conduct a mail ballot election. The mail ballot, which contained blanks for voters to write in names, did not limit the number of candidates. We find that, under the circumstances, it was not unreasonable for the Respondent to change the procedure to a mail ballot election, and that there is no evidence that the change hampered Rogers' or anyone else's candidacy.

The judge also found that the Respondent changed the time of the ballot count and excluded nonemployee Kirk from the count to prevent Rogers or anyone favoring Rogers from observing the count. Again, the record fails to support the judge's findings. There is no evidence that the Respondent changed the time of the count in order intentionally to exclude Rogers, or for any other arbitrary reason. Kirk's exclusion was permitted by the Respondent's bylaws. Further, there is no evidence that everyone present at the count opposed Rogers or that the count was irregular in any way. In short, we find nothing to suggest that the integrity of the count was in any manner jeopardized by the change in time or by the exclusion of Kirk.

Under *Wright Line*[5] principles, the General Counsel must establish a prima facie case that the Respondent's decision to remove Rogers in September was unlawfully motivated. Once a prima facie case is established, the Board will find the removal violated Section 8(b)(1)(A), unless the Respondent shows that it would have removed Rogers even absent his protected conduct. See *Toledo World Terminals*, 289 NLRB 670, 674 (1988).

Having found nothing in the record to support the judge's finding that the manner in which the Respondent conducted the mail ballot election was unfair, we cannot agree with the judge's reliance on the mail ballot procedure as evidence of unlawful motivation.[6] We acknowledge the evidence of animus motivating Rogers' removal in March, but we find, based on Rogers' assault of Acting Steward Osborne, that the Respondent has shown that it had legitimate reasons for conducting the election in September and that it would have conducted the election in September even absent Rogers' protected conduct that led to his removal in March. It follows that, even assuming the General Counsel established a prima facie case that Rogers was removed as steward in September because of his protected conduct, the Respondent demonstrated it would have removed Rogers in September even absent his protected conduct. *Mine Workers (Reitz Coal)*, 282 NLRB 106 fn. 3 (1986).

We therefore shall dismiss the complaint allegation that the Respondent's removal of Rogers as a result of the election in September was unlawful.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Teamsters Local 413, affiliated with International Brotherhood of Teamsters, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a), substitute the following for paragraph 2(b), and reletter the paragraphs accordingly.

''(b) Make Rogers whole, with interest, for all losses of dues reimbursements or other monetary losses that he may have suffered as a result of the Respondent's removal of Rogers in March 1993 from the position of steward at Refiners Transport & Terminal Corporation.''

2. Substitute the attached notice for that of the administrative law judge.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] As even the judge recognizes, the fact that the Respondent conducted the election in September cannot alone be grounds for finding a violation, especially in view of the fact that Rogers consented to the election.

[7] Because we find that the Respondent did not act unlawfully in holding the election as it did, we find the September election results to be valid and do not order reinstatement of Rogers, who lost the election, to his position as steward.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT remove any shop steward because the steward has filed unfair labor practice charges under the National Labor Relations Act or because the steward has engaged in any other concerted activities that are protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Rogers whole, with interest, for all loss of dues reimbursements or other monetary losses that he may have suffered as a result of our removal of Rogers in March 1993 from the position of steward.

TEAMSTERS LOCAL 413, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

James E. Horner, Esq., for the General Counsel.
Robert K. Handleman, Esq. (Handleman & Kilroy), of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Columbus, Ohio, on January 18 and 19, 1994. On May 18, 1993,[1] Jonah Dean Rogers, an individual, filed the charge in Case 9–CB–8558 against Teamsters Local Union 413, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Respondent or the Union). On October 1, Rogers filed the charge in Case 9–CB–8695 against Respondent. On December 1, the General Counsel of the National Labor Relations Board (the Board) issued a consolidated complaint (the complaint) against Respondent alleging violations of Section 8(b)(1)(A) of the Act. Respondent duly filed an answer admitting that the Union is a labor organization within Section 2(5), admitting the status of certain of its agents within Section 2(13) of the Act, and admitting that the Board has jurisdiction of this matter,[2] but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial, and my observations of the demeanor of the witnesses, and upon the briefs that have been filed, I make the following findings[3] and conclusions:

A. *Facts*

1. Background and contentions

At the inception of the events in question, the following individuals occupied the positions opposite their respective names, and they were agents of the Respondent within the meaning of Section 2(13):

Vernon Bell	President
John Starkey	Vice president
Charles Teas	Secretary-Treasurer
Jeffrey Pierce	Business agent

Mike Wellman was the Local's recording secretary. According to Respondent's bylaws, its powers of management are vested in its executive board which consists of the Local's president, vice president, secretary-treasurer, recording secretary, and three trustees. An undisputed fact that permeates this case is that, at the time of the events in question, Bell was *suspected* of corruption by many members of Respondent. (Bell was suspended from his position as president on August 20; he was replaced by Starkey.) Another undisputed fact is that, at the time of the events in question, the Respondent was experiencing a high degree of factionalism; Bell, Starkey, Teas, and Pierce were in one faction; Wellman and Charging Party Rogers were in another.

The Union represents truckdrivers in the Columbus area; one of the employers whose employees it represents is Refiners (or BMI, the name of the parent corporation to which the witnesses, and exhibits, sometimes referred). The Union has had a collective-bargaining relationship with the Employer for several years The collective-bargaining agreements involved have provided grievance and arbitration procedures and a requirement that the Employer deal with a steward at the facility. Testimony was received describing how, over the years, stewards have been selected at Refiners. Charging Party Rogers testified that from 1982, when he was first employed, until 1992, elections for stewards were conducted in this manner:

> What they would simply do, the Teamsters Local 413, the business agents that was for that terminal, place of employment, they would come out and they would post a notice stating the fact that there would be a steward's election being held. Anyone who would be interested in participating in the steward's election would sign [on the posted notice] their name as a candidate. . . . And that notice would stay up for seven days. At the end of seven days the business agent for that terminal for Refiners Transport would come back and remove that and post another notice of who the

[1] All subsequent dates are in 1993 unless otherwise indicated.

[2] Refiners Transport & Terminal Corporation, a division of BMI Corporation (the Employer or Refiners) has an office and place of business (the facility) in Columbus, Ohio, where it is engaged in the interstate transportation of gasoline and other chemicals. During the year preceding issuance of the complaint, the Employer purchased and received at its facility goods valued in excess of $50,000 directly from suppliers located at points outside Ohio. Therefore, the Employer is engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] Portions of the transcript have been electronically reproduced. Proper punctuation of transcript quotations is supplied only where necessary to avoid confusion. Rather than use ''(sic)'' when quoting some exhibits, minor changes are made without notation.

> candidates were. He would at that time place a ballot box, a sealed ballot box with envelopes on one side of the ballot box and blank paper on the other side of the ballot box. What you would do is you would cast your ballot, you would sign your name, place it in the ballot box for whom you are voting for. That would be up for [the ballot box would be left at the Employer's premises for] seven days. At that time the business agent and several members of Local 413 would open the ballot box, pull out the envelopes and count the votes, the candidates, to see who won the election.

Rogers testified that it was by this procedure by which he was elected steward in 1992. None of this testimony is disputed.

Respondent's bylaws, article XX state:

> Stewards must stand for re-election each three (3) years. A steward can be recalled within three (3) years by a majority petition or by Executive Committee by reason of activity that would jeopardize the Union.

Stewards are not paid for time spent performing their responsibilities; however, they are reimbursed for their dues payments at the end of each year.

The complaint alleges that because of his protected concerted activities, and in violation of Section 8(b)(1)(A), Respondent, by its executive board, removed Rogers from his position of steward in March. Respondent admits that the March removal occurred and that the removal was conducted by the executive board, but it denies a violation. Rogers was reinstated to the steward's position on August 2, but he was again removed from his steward's position on September 17. The second removal of Rogers from the steward's position was not by an action of the executive board; it was by action of Business Agent Pierce who conducted an election among the members at Refiners on September 17 (when Rogers had about 2 years left on his term). The complaint alleges, and Respondent denies, that Pierce's conduct constituted another violation of Section 8(b)(1)(A) by Respondent.

2. The March 28 removal of Rogers as steward

Teas presided over the Union's regular monthly meeting of February 28 in the absence of Bell who was then confined in a substance abuse program. When the regular business was completed and new business was called for, Rogers and others took the floor to complain that Bell had been engaging in corrupt conduct. Teas declared the meeting adjourned, but the members did not disburse. Some members engaged in physically confrontational conduct toward the executive board members who were present, but there is no evidence that Rogers did such.

On March 1, a regular business day for Respondent's offices, several members, including Rogers, picketed at the Union's hall. Starkey and Pierce credibly testified that when they arrived at the hall Rogers told them that the offices were closed, but there is no evidence that Rogers engaged in any physical obstruction of access to the premises.[4]

On March 4 the Respondent's executive board suspended seven stewards for conduct at the executive board 28 meeting, or the March 1 picketing, or both. Rogers was *not* one of those stewards.

On March 8, and for 2 or 3 days thereafter, Teamsters Joint Council No. 41 (Cleveland), pursuant to instructions by the International, conducted hearings concerning the members' complaints against Bell. Rogers testified at that hearing; he testified that Bell had been engaging in misconduct, including corruption.

Bell was present to preside over the regular monthly meeting of March 28. Respondent's executive board met just before the general monthly meeting of that date. According to Wellman, at that executive board meeting, Bell proposed that the executive board remove from their steward's positions Rogers and Phil Normile (a steward at another employer's). Wellman testified that, in making his proposal, Bell referred to videotapes of the March 1 picketing of the union hall:

> His explanation was that he seen them on a videotape that was obtained by one of the news channels, and they seen him out there protesting, and that's the reason he was removing them.

Wellman testified that he opposed the removal of the two stewards, but he was outvoted. During the minutes between the executive board meeting and the general meeting of March 28, Wellman told Rogers what had happened. After the general meeting, Rogers approached Bell. According to the testimony of Rogers:

> I, myself, and a mechanic from Refiners Transport, Bob Schreck, approached Mr. Bell on the discussion that Mr. Wellman came to me prior to the meeting about him removing me as a steward. I asked Mr. Bell about this.
>
> Mr. Bell, in fact, told me that he was going to remove me for misconduct of the Local Union. I told Mr. Bell that I had never seen any kind of papers on this, never had any hearing on this, had no knowledge of any kind of misconduct. I asked him if this, in fact, was in any kind of retaliation for my testimony in the March hearings. He told me that it might be and that it might not be. And I asked him, ''Is it or is it not?'' He then told me that I would be receiving a letter in the mail.

Schreck was called to corroborate this testimony by Rogers. Schreck did not; he was emphatic that Bell ''never said nothing'' when Rogers asked why he was being removed as the Refiners' steward. I credit Schreck.

By letter dated March 31, Respondent informed the Employer that Rogers had been removed from his steward's position. No reason for the action was stated.

Respondent called Teas and Starkey to testify about the reasons for the March 28 removal of Rogers as the Refiners employees' steward. Teas testified that the removal of Rogers was because of the disruption during the February 28 meeting, tire slashings that followed the meeting, and the blocking of ingress at the union hall on March 1. Teas acknowledged, however, that he witnessed no such conduct by Rogers, and he did not know anyone who had. Starkey's testimony was parallel; he testified that Rogers was removed for misconduct on February 28 and March 1, but he did not testify that he witnessed any misconduct by Rogers, and he did

[4] The videotapes submitted by Respondent are inconclusive.

not testify that anyone else at the March 28 executive board meeting claimed that they had either.

Rogers and the other stewards who had been relieved of their positions appealed to Joint Council 41. Also, Rogers and others, by letter dated April 2 to the Joint Council, with copy delivered the same date to Respondent, made additional (and repeated) charges against Bell, Starkey, Teas, and some of the other members of Respondent's executive board. The Joint Council scheduled a meeting for July 26 to hear members' complaints against Respondent's officers, and the officers' complaints against Rogers and the seven other stewards who had been removed by executive board.

3. Rogers' July 20 assault on Osborne

On July 19, Bell appointed Art Osborne as acting steward of the Refiners employees. Osborne appears to be in his early 50s; Rogers is a heavy, powerfully built individual who appears to be in his early 30s. It is undisputed that, on July 20, Rogers set upon Osborne and severely beat Osborne with his fists.

Osborne described the assault:

> I came to work probably around 4:15 in the evening because Mondays and Tuesdays I was working evenings. And I went to the garage, and the fellow that I went to the garage to see was not there. I came back toward the office to pick up my dispatch for the day. And Dean and Bob Taylor, Jim Kirk and Randy Fisher all surrounded the front door, and Dean came in, and it was myself and one other fellow was walking through. As we were talking, Dean hit me, and he hit me two other times.

All three blows were to the head; Osborne went to an emergency room where he was examined and released.

On cross-examination, Rogers was asked about the assault, and he testified:

> Q. And Mr. Osborne at the time was functioning as the acting steward out at Refiners; correct?
>
> A. That I don't know, sir.
>
> Q. Well, did you ever have information that Mr. Osborne had agreed to be the acting steward?
>
> A. I never seen any legal documents stating that.
>
> Q. Leaving aside the legalities as to whether you saw anything in writing, did you have information that Mr. Osborne was functioning as the acting steward at Refiners?
>
> A. Only through word of mouth.
>
> Q. Through what word of mouth?
>
> A. Through members of Local 413.
>
> Q. In any event, you understood through word of mouth that Mr. Osborne was the acting steward at the time that you got into the altercation with him; correct?
>
> A. Yeah.
>
> Q. Did your altercation have anything to do with the fact that Mr. Osborne was the acting steward?
>
> A. I have no idea. I believe you would have to ask him that.

On the date of the assault, the Employer suspended Rogers and Osborne pending investigation.

On July 26, the Joint Council conducted the previously scheduled conference. A settlement of all outstanding problems was proposed; the proposal would have caused all stewards to be reinstated. Rogers testified that Teas initially resisted reinstating Rogers. Rogers testified that Teas told the Joint Council that he opposed the reinstatement of Rogers because, ''Mr. Rogers has pending Labor Board charges.'' However, according to Rogers, a director of the council prevailed on Teas to relent, and Teas ultimately agreed.

Teas testified that he had initially opposed reinstatement of Rogers because:

> Well, we had just become aware and been told with reports from his fellow drivers at Refiners Transport that Dean Rogers had taken a couple of people that didn't work there onto the property over there and he had beat up Art Osborne.

Teas did not testify that he mentioned the beating at the July 26 Joint Council meeting; and he did not dispute Rogers' testimony that he initially opposed the reinstatement of Rogers because Rogers had filed the initial charge in this case. Teas testified that he agreed to reinstate Rogers ''Because most of the guys on that panel were sort of irritated that I wanted to exclude one.''[5]

On August 2, Bell issued letters to all of the affected stewards, including Rogers, reinstating them to the stewards' positions at their respective employers.

Also on August 2, a grievance meeting was held on the suspensions of Osborne and Rogers. As a result of that meeting (and a followup meeting), Osborne was reinstated with backpay, and Rogers was reinstated without backpay. Osborne and Rogers returned to work on August 3 (1 day after Respondent had reinstated Rogers as steward).

4. The September 17 removal of Rogers as steward

Osborne testified that, on his return to work, he told other employees what had happened. Osborne testified that Mattes, a former steward, told him (Osborne) that he wanted a new election for steward, and was going to talk to Rogers about it.

Mattes testified that on August 13:

> I went into the driver's room to get dispatched and Dean Rogers was there. I asked Dean to step outside, that I would like to have a word with him.
>
> At that time I confronted Dean and told him that I was going to petition for an election for steward. And he asked me why. I give him some brief reasons. . . . Somehow that the situation come up about this supposedly altercation between Mr. Osborne and himself. And he asked me if that had anything to do with it. And I said, ''Definitely.'' And I . . . said to him, ''I wasn't there, but I know deep down what happened and you do too.''
>
> . . . .
>
> At that time he told me, he said, ''[You] don't have to petition,'' that he would request an election. I said, ''That's fine with me, Dean, as long as it's done.'' Because I was going to petition one way or the other. If

[5] Certain errors in the transcript have been noted and corrected.

> he didn't do it, then I would petition for one. It was either that evening or the next morning, I am not sure, I had a conversation with Dean again. He said that he had contacted Jimmy Duff and it was taken care of.

Jimmy Duff is a business agent of Respondent's, and he had previously serviced Respondent's contract with Refiners, but not at the time. Jeffrey Pierce serviced the Refiners contact at the time. One of the duties of business agents is to set up steward's elections at facilities they service, as the above-quoted, undisputed testimony of Rogers shows.

Osborne testified that Mattes told him that Rogers had consented to a new election; Osborne further testified that he relayed this fact to Pierce. Pierce testified that he accepted Osborne's report (of what Mattes had told Osborne) as evidence of consent by Rogers to a new steward's election.

Pierce testified that he prepared a notice of election. A copy of the August 27 notice, as I shall call it, was received in evidence. It comports with the custom for elections that was described by Rogers, and it concludes:

> THIS NOTICE WILL BE POSTED FRIDAY, AUGUST 27, 1993 AND WILL BE REMOVED FRIDAY, SEPTEMBER 3, 1993. THE ELECTION WILL BE HELD AT A LATER DATE.

Pierce testified that on August 27, he went to the Employer's facility and posted the notice. While he was there, Pierce testified, he was told by the dispatcher that Rogers was on the telephone and wanted to talk to him. According to Pierce:

> I get on the phone just right as we get in the door, and it's Dean Rogers on the phone. He said, ''Jeff, what's up?'' I said, ''We're out here to post the steward's election.'' He said, ''Okay.'' I said, ''Nice talking to you,'' and that was it. A very short, brief conversation. So we put the notice up and we left.

On 1 or 2 days before the posting period of the August 27 notice was to expire, someone took it down. On September 7, Pierce sent to all eligible voters the following letter with enclosures:

> Due to the fact that a sign up sheet for Paid Union Steward and Alternate Union Steward, posted on August 27, 1993, was without authorization removed from the bulletin board, Local Union 413 is conducting a Secret Mail Referendum Ballot for these two positions.
>
> Enclosed you will find a ballot with Paid Union Steward and Alternate Union Steward, and Alternate Union Steward, please fill in the name of the person you desire for each position on the blank lines. Insert the ballot in the blank enclosed envelope, seal and place in the self addressed envelope provided.
>
> The return address on the envelope to be mailed back to the Union Hall must have the return address label in order to be counted.
>
> The ballots will be counted Friday, September 17, 1993, 4:00 p.m., at the Union Hall, 555 E. Rich St, Columbus, OH.

During the General Counsel's case-in-chief, Rogers testified that he never saw the August 27 notice. Rogers testified in the case-in-chief that his first knowledge that an election might be held came in ''early September'' when:

> One day I was going to work early in the morning, and I was stopped by Bob Schreck, Randy Fisher, and Herb Schrum, and they told me that they heard that there was going to be a steward's election.

On cross-examination, Rogers was asked if the three other employees told him how they found out there would be a new election. Rogers replied: ''No. I hadn't asked at that time.''

Further during the case-in-chief, on direct examination, and cross-examination, Rogers testified (several times) that he called Pierce on September 13; specifically, on direct examination, Rogers testified: ''And I had called Mr. Pierce on the phone *at the Local Union*.'' According to Rogers on direct examination:

> I called Mr. Pierce and told him—I, first of all, I asked him if, in fact, there was going to be a steward election. He told me that, yes, there was going to be a steward election. I asked him if he had a petition in accordance with the Bylaws, and he told me no, but he had the consent of the members. I said, ''If you have the consent of the members, I would like to see it in written form.'' He had then told me that it was not in written form. I told him that the election was illegal. He said, well, that was my opinion and that they were going to proceed on with the election. I told him, I said, ''Okay. You go ahead and hold your election. It is illegal. I stand in protest. And you do your thing and I will have to do mine.''

Rogers also testified that he also told Pierce that there had never been a mail-in election such as that directed by Pierce's September 7 letter to the eligible voters.

Schreck was asked by the General Counsel, and he testified:

> Q. Do you recall, though, if you had any conversation prior to actually voting with Dean [Rogers] or anyone else about the election and about who to vote for or why a new election was being held?
>
> A. I think I asked Dean, you know, about the election, you know, how do we know who to vote for. And I don't remember what Dean's reply was to me because I think I asked him one morning when he was getting off work or something. And I don't remember what his reply was, you know.
>
> Q. Do you recall any other conversation or is that the only one?
>
> A. No, that's about the only one that I really—you know, if I asked anybody about it, it was either Dean or [employee] Dave Lester.

Fisher testified that he was first told of a new election by Schreck who told him that there was a notice on the bulletin board, and he went to see it. Schreck was not asked if he told Rogers about the notice, or the election, as Rogers testified on direct examination. Schrum (the third employee from whom Rogers testified that he originally learned of the elec-

tion, according to Rogers' testimony during the case-in-chief) was not called to testify by the General Counsel.

The General Counsel called Rogers on rebuttal. At that point, Rogers admitted that there had been a conversation between Pierce and himself on August 27. Rogers then testified that in that August 27 telephone conversation:

> I asked Mr. Pierce, he came on the phone, and said, ''Hello, Dean.'' And I said, ''Jeff, what are you doing there?'' He said he was posting a steward's election, a notice. And I said, ''Is that right?'' He said, ''Yes.''
>
> I asked him if he had a majority petition. He told me no. I told him okay. You know, I stand in protest. He said, ''Okay. You do what you got to do,'' and he hung up on me.

Finally on rebuttal Rogers denied that he had ever expressed to anyone that he consented to new steward's election.

5. Credibility resolutions on the consent issue

That Rogers was not present to testify to the whole truth was made quite apparent by a particular segment of his cross-examination which has been quoted above. Rogers first stated that, at the time of his assault on Osborne, he did not know that Osborne was the acting steward; that this answer was a lie was made apparent as Rogers attempted to evade the (obvious) next question by testifying that ''I never seen any legal documents stating that.'' Then he admitted that he did have knowledge that Osborne was the acting steward, but then he compounded the evasion by testifying that he did know, but ''Only through word of mouth.'' Then Rogers testified that he did not know if his assault on Osborne had anything to do with Osborne's being appointed acting steward. In a display of arrogance and insolence, as well as mendacity, Rogers added, ''I believe you would have to ask him that.''

Before Pierce testified Rogers was emphatic that his first knowledge of a possible steward's election came when Fisher, Schreck, and Schrum told him of such in ''early September.'' Before Pierce testified, Rogers was also emphatic that his protest to Pierce was on September 13. But then Pierce testified. So Rogers moved his emphatic protest at August 27. Of course, if he made an emphatic protest about the election on August 27, his testimony that his first knowledge of the election came in early September was necessarily false. Why would Rogers offer such false testimony? It was because Pierce was telling the truth, and Rogers (who heard Pierce testify) knew it.

Rogers perpetrated a brutal assault on Osborne on July 27. As Mattes testified, he and other employees did not want a steward who would do that. Mattes told Rogers that he was about to circulate a petition for recall. Rogers, obviously then experiencing some chagrin over the assault on Osborne, told Mattes that the petition was not necessary; he would consent to an election. Word of this consent got to Pierce through Osborne. And Pierce used the report as evidence of Rogers' consent to begin preparing for a new steward's election.

On August 27 Pierce took an election notice to the Employer's facility and posted it. While Pierce was there, Rogers coincidentally telephoned his dispatcher. Evidently the dispatcher mentioned to Rogers that Pierce was there, and Rogers asked to speak to him. As Pierce testified, Pierce told Rogers that he was posting an election notice, and Rogers said, ''Okay.'' That was consent to continue the process of holding an election without a prior removal or recall processes that otherwise would have been required by Respondent's bylaws.

Before the election, or possibly after, Rogers had a change-of-mind. However, (1) Rogers had given the ''Okay'' to Pierce on August 27, and (2) the notice of election had been posted for at least 2 or 3 working days[6] without his doing anything. To explain these two factors, Rogers concocted the story that he had never seen, nor heard of, the notice of election and that his first knowledge of an election was when Fisher, Schreck, and Schrum told him about it in ''early September.''

Schreck and Fisher did not corroborate Rogers on the point; Schreck testified that he only ''asked'' Rogers about who could be nominated in the election; Fisher testified, but was not asked if he told Rogers about the election; and Schrum was not called by the General Counsel. Also, when asked on cross-examination if Fisher, Schreck, and Schrum told him how they came into such knowledge, Rogers replied that he had not asked. That is, according to Rogers, he had put up a heroic struggle against the union agents who had wrongfully deprived him of his steward's position in March, he had been reinstated in August, but then, in ''early September,''when he was told that he stood to lose the position again, he did not ask the bearers-of-the-bad-news how that could be. This is too much to believe, and I do not.

I note that: (1) Regularly checking bulletin boards is the sort of thing that one would expect of any steward who professes to possess even the smallest degree of responsibility for his office; that is the sort of thing that stewards just do; (2) If he did not see it, Rogers assuredly heard about it from Fisher (who admitted seeing it for 2 or 3 days) or others in his political camp; and (3) Most importantly, as Rogers admitted on rebuttal, Pierce told Rogers on August 27 that ''he was posting a steward's election, a notice''; most probably the first thing Rogers did the next time he was at the terminal was to check the notice himself. Therefore, I believe that Rogers became well aware of the notice during the period that it was posted.[7]

Rogers did nothing with his knowledge until the vote was in. Rogers' (detailed) testimony about a September 13 telephone to Pierce ''*at the Local Union*'' was false. Pierce produced motel records to show that, at least by 1:27 p.m. on August 27, he was in Chicago. When confronted with that fact, Rogers testified that his September 13 call was early in the day; however, Rogers's pretrial affidavit placed the call to Pierce in the afternoon; when confronted with that fact, Rogers created a third telephone call, one on September 10, and he testified that the reference to an afternoon call was really to that call. I credit Pierce; there was no September 13 telephone call between Rogers and Pierce. Rogers did nothing before the vote was in because, as Pierce testified, Rogers had given the Union the ''Okay'' to conduct the election on August 27.

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[6] Rogers' political ally, Fisher, testified that he saw the August 27 notice on the bulletin board for ''two or three'' days.

[7] Alternatively, if, after the beating of Osborne, the employees' esteem for Rogers was so low that even his allies did not tell him about the notice, it increases the likelihood that Rogers consented to the election, and my conclusion on that point is fortified.

6. Conduct of the September 17 election

As noted, the September 7 letter from Pierce to all eligible voters scheduled the vote count on September 17, at the Union's hall, at 4 p.m. Rogers testified that he had been scheduled to work on September 17 until 4 or 5 p.m. When the vote count was scheduled for 4 p.m., Rogers secured permission from Refiners' terminal manager to be released from work in time to witness the count. By letter dated September 13, Pierce notified the eligible voters:

> Due to a discharge hearing with another carrier, the ballots for Paid Union Steward and Alternate Union Steward will be counted at 2:00 p.m. instead of 4:00 p.m., Friday, September 17, 1993, at the Union Hall, 555 E. Rich St., Columbus, OH.[8]

Rogers testified that there was ''no way'' that he could get off in time for a 2 p.m. tally of ballots, so he asked former employee Jim Kirk to attend the counting as a witness on his behalf.

Kirk testified that he appeared at the union hall at 2 p.m on September 17. He told Pierce that he was there to act as an observer of the tally as a representative of Rogers. Pierce told Kirk that he could not observe the tally because he was neither a member of Respondent in good standing nor was he a current employee of the Employer. Kirk acknowledged thathe was on an involuntary withdrawal status on September 17 (although the action that put him in that status was later rescinded).

Pierce testified that the count of ballots was conducted by himself, David Lester (the ultimate alternate steward winner), George W. Saunders (another business agent), and William Baldwin and Howard Janes (whom Pierce did not identify). According to Pierce and documents that Pierce identified, Mattes received 26 votes, Lester received 15 votes, and Rogers received 6 votes. By letters dated September 23, the Union (by vice president, then Acting President Starkey) notified the Employer that Mattes had replaced Rogers as steward and that employee David Lester had become the alternate steward.

B. *Analysis and Conclusions*

Rogers protested the actions, or inactions, of union officers by letters, by speaking up at meetings, and by picketing the union hall. An employee's protest of conduct (real, or in good faith perceived) by the officers of a labor organization is generally protected by the Act. *Laborers Local 308 (Postal Service)*, 281 NLRB 1074 (1986), and cases cited therein. That protection can be lost by conduct such as violence committed during the otherwise protected protest, but there is no evidence that Rogers engaged in any such conduct during his protests.

As Wellman testified, without contradiction, at the March 28 executive board meeting, Respondent's president, Bell, proposed that Rogers be removed from the steward's position because he had engaged in the statutorily protected protests of February 28 and March 1; and the executive board acted on that proposal. Therefore, by the March 28 removal of Rogers from his steward's position at Refiners, Respondent violated Section 8(b)(1)(A), as I find and conclude.

The Union's bylaws provide for removals of stewards by votes of the executive board or petitions to the executive board by a majority of the members in a represented unit. The General Counsel contends that, in view of the animus that Respondent possessed toward the protected concerted activities of Rogers, any removal of Rogers by other than an executive board vote or a majority petition proves a violation. I disagree. Rogers consented to an election that could possibly have removed him from the office of steward, even though the bylaws did not provide for such removal without a petition or executive board vote. The election to which Rogers consented could have been conducted fairly; and, if it had been, there would have been no violation of the Act in the Union's removal of Rogers from the steward's position at Refiners and replacing him with the (fair) election victor.

The rules for conducting stewards' elections are not set out by Respondent's bylaws. Given the fiduciary nature of the Union's relationship to the unit employees, including Rogers, the fundamental standard that Respondent was required to observe was one of fairness. An entirely objective standard by which fairness can be judged is custom.

The stewards' elections at Refiners had previously been conducted by a posting of the names of nominated candidates and leaving a ballot box at the facility for a week. Pierce changed all that. Pierce removed all possibility of a nomination procedure and he ordered a mail-in ballot procedure without one. He testified that he ordered these procedures after consulting with other executive board members, including Teas, because the August 27 notice had been taken down.

Respondent justifies conducting some election on the grounds that Rogers consented to it, and I have agreed. However, when an unusual problem appeared (the disappearance of the August 27 notice), and some adjustment in the process might have been called for, Pierce did not consult with Rogers. Rogers was the person most directly affected by the election, and Rogers was the person, again, on whose consent Pierce relied to conduct the election in the first place. If Pierce had possessed a modicum of good faith, or any sense of responsibility toward the membership (including Rogers), Pierce would have consulted with Rogers. Pierce did not do that; Pierce consulted only with those who had previously, unlawfully, removed Rogers from the steward's position.[9] Those persons included Teas who, it is undisputed, proposed making Rogers the only steward not reinstated at the July 26 joint council meeting. The only reason Teas gave the joint council, it is further undisputed, was that Rogers had filed charges under the Act. There is not the slightest reason to believe that the animus expressed by Teas at the July 26 joint council meeting was not shared by Pierce. Pierce unilaterally altered the election process to call for a mail-in balloting process that precluded a (fair) nominating procedure. Without more, I would find a violation of Section 8(b)(1)(A), but there is more.

[8] A secretary signed the letter for Pierce who was in Chicago on September 13, as noted.

[9] Rogers should have been consulted. Pierce knew it, and, to the extent that he sought to convey the impression that he was acting in the interests of the employees when he failed to consult with Rogers, Pierce's testimony was false.

Rogers made arrangements to attend the 4 p.m., September 27, ballot counting that was originally scheduled by Pierce. Then Pierce changed the hour to 2 p.m., making it impossible for Rogers to attend. Pierce stated in his notice of September 13 that he was changing the hour to 2 p.m. ''Due to a discharge hearing with another carrier.'' Not one word of testimony was offered to substantiate this claim, even though the manipulation of the hour is a principal part of the General Counsel's case. Assuming there is some element of truth in the claim that there was a grievance hearing that would have conflicted, there is no evidence that Pierce attempted to adjust the hour of that hearing (as parties to such proceedings commonly do). Finally, Pierce was not required to hold the count on September 17; the ballots would presumably have said the same thing, even if they had been opened at a later time, a time when at least some members who were not opposed to Rogers, or Rogers himself, could have attended.

I do not believe that Pierce changed the hour to attend to other business. I believe he intended the consequences of his actions; he wanted Rogers excluded from the vote count. He also wanted anyone in sympathy with Rogers barred from witnessing the tally. The custom (the objective standard of fairness that had been established for, and by, the employees) was that at the end of the week of voting, the business agent conducted a count in full view of anyone who could be present; there is no evidence that nonmembers, or even nonemployees, were excluded from observing tallies. Kirk, indeed, was neither an employee nor a member in good standing, and perhaps that could legitimately have excluded him from other tallies of other elections conducted according to customs governing those other elections.[10] There is no suggestion that the exclusion of Kirk was necessary to maintain order or protect *the integrity* of the counting process. Like the use of the mail-in ballot with no nomination process, the exclusion of Kirk from observing the counting process was another element that rendered the election process unfair.

In summary, Rogers consented to an election, but he did not consent to an unfair election. To have been fair, this election should have been conducted according to the customs that had been established at the Employer's facility, at least as far as possible. To the extent that was not possible, and adjustments had to be made, Rogers should have been consulted because it was his consent upon which the holding of the election was predicated in the first place.

In view of the clear evidence of animus that Respondent held against Rogers' filing unfair labor practice charges (as well as animus against Rogers' other protected concerted activities) it must be concluded that Respondent removed Rogers a second time from the office of steward because of Rogers' protected activities, including specifically the protected activity of filing a charge under the Act. And this action by Respondent was a second violation of Section 8(b)(1)(A), as I find and conclude. *Iron Workers (Walker Construction)*, 277 NLRB 1071 (1985), and cases cited infra.

[10] Other customs for stewards' elections at facilities of other employers, and customs for intraunion elections, were described by some witnesses.

THE REMEDY

The usual affirmative remedies for violations such as those involved here include orders of reinstatement to the steward's position.[11] I have seriously considered not ordering reinstatement in this case because of Rogers's assault on Osborne. Employees should not have imposed upon them as their steward anyone like Rogers. I will, however, order reinstatement because the employees may still want Rogers as their steward for some unknown reason (such as his willingness to oppose Respondent's leaders, many of whom the members consider corrupt). And if the members, understandably, no longer want Rogers as their steward, they can petition the executive board to remove Rogers *as soon as he is reinstated pursuant to my order*.[12]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Teamsters Local Union 413, affiliated with International Brotherhood of Teamsters, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Removing any shop steward because the steward has filed unfair labor practice charges under the National Labor Relations Act or because the steward has engaged in any other concerted activities that are protected by the Act.

(b) In like or related manner restraining or coercing employees of Refiners Transport & Terminal Corporation in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jonah Dean Rogers immediate reinstatement to his former position as shop steward at Refiners Transport & Terminal Corporation with all rights and privileges that he previously enjoyed while in such position.

(b) Make Rogers whole, with interest,[14] for all loss of dues reimbursements or other monetary losses that he may have suffered as a result of the Respondent's removals of Rogers from the position of steward at Refiners Transport & Terminal Corporation.

(c) Post at its offices, meeting halls, and all other places where notices to members are customarily posted copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized rep-

[11] *Laborers Local 308 (Postal Service)*, supra.

[12] And, by filing another charge under the Act, Rogers can obtain review of any alleged involvement by Respondent's agents in any subsequent removal petition process.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] Interest shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

resentative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 9 signed copies of the said notices, in sufficient numbers to be posted by Refiners Transport & Terminal Corporation, the Employer being willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.